by a locomotive engineer as to the cause of an accident, when the statement is made shortly *after* the accident, the argument frequently turns on the admissibility of the statement as an *admission* by an agent, it being inadmissible unless made *dum fervet opus.*[10] But the real inquiry in such cases should be whether the circumstances were such as to make the statement a Spontaneous Declaration, and thus admissible under that exception to the Hearsay Rule. The two inquiries are indeed quite similar, but as an agent's admission the remark is admissible only when made while the act was *in progress,* while as a Spontaneous Declaration it is admissible even though made shortly *afterwards,* provided the excitement occasioned by the occurrence still prevailed over the mind of the speaker.

The leading case of *Vicksburg, etc., R. Co.* v. *O'Brien*[11] illustrates this confusion. Here a statement by a locomotive engineer was made from ten to thirty minutes after an accident. A majority of the court excluded it on the ground that, not having been made by the actor while acting, it was not a part of the *res gestæ,* and hence inadmissible as an admission by an agent. Four judges dissenting held that the statement should be received as a part of the *res gestæ.* So far as this argument is concerned, the majority clearly have the better of it, but it is possible that, under the circumstances, the statement might have been admissible as a Spontaneous Declaration.

In view of the general confusion as to the correct scope of the *res gestæ* principle, it is to be hoped that the Virginia Court will henceforth limit the use of the words to those cases where it is clearly applicable, if any such there be,[12] and when occasion next arises will adopt the more modern and more accurate term, Spontaneous Declaration. T. J. M., JR.

MASTER AND SERVANT—NEGLIGENCE WHERE USUAL APPLIANCES ARE SUPPLIED.—The opinions of the various courts of this country are hopelessly divided on the question of whether the

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[10] Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99.

[11] *Supra.*

[12] "The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision." 3 WIGMORE, EVIDENCE, § 1795.

master can be found negligent when he has supplied appliances which are by common usage used in that particular trade.[1] On the one hand the criterion is called the "Unbending Test", which declares that where a master has provided such instrumentalities as are generally used in that business, then as a *matter of law* negligence is rebutted.[2] On the other hand common usage is acknowledged to be evidence of what is reasonable and proper care, but this evidence may be overcome if such common usage can be proved inadequate, and there are other practical means or appliances.[3] The doctrine of the "Unbending Test" is justly criticized by Henry R. Miller, Jr., in an earlier article in the VIRGINIA LAW REVIEW.[4] At the time of Mr. Miller's article, the status of this rule in Virginia seems to have been undecided. Some of the Virginia cases up to quite recently have apparently leaned towards the use of the "Unbending Test" as the correct guide.[5] But along with these cases are those that seem to deny this test and, while granting that common usage is evidence of ordinary care, yet hold that it does not rebut negligence as a *matter of law* when such common usage is not adequate and other instrumentalities are practical. On this point Buchanan, J., of the Supreme Court of Appeals of Virginia, in the case of *Richmond & P. R. Co.* v. *Rubin*,[6] says:

> "The question of negligence, or due care, is one peculiarly within the province of the jury and cannot be established as a *matter of law* by a state of facts about which reasonably fair-minded men may differ." (Italics ours.)

With the test of negligence in this uncertain state in Virginia, the question undoubtedly has been finally decided in the recent case of *Jeffress* v. *Virginia R. & Power Co.*,[7] where, referring to prior doubtful cases and denouncing the "Unbending Test", Kelly, P., says:

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[1] Chicago & G. W. R. Co. *v.* Armstrong, 62 Ill. App. 228; Worheide *v.* Missouri Car & Foundry Co., 32 Mo. App. 367; Ketterer *v.* Armour & Co., 247 Fed. 921; *Contra*: Swaczyk *v.* Detroit Edison Co. (Mich.), 174 N. W. 197; Geno *v.* Fall Manitain Paper Co., 68 Vt. 568, 35 Atl. 475; Martin *v.* California C. R. Co., 94 Cal. 326, 29 Pac. 645; Grant *v.* Graham Battery Co., 176 N. C. 256, 97 S. E. 27. See also Note, 16 L. R. A. (N. S.) 128; 29 CYC. 435.

[2] Titus *v.* Bradford B. & K. R. Co., 136 Pa. St. 618, 20 Atl. 517, 20 Am. St. Rep. 944.

[3] Wabash R. Co. *v.* McDaniels, 107 U. S. 454; Texas, etc., Pacific R. Co. *v.* Behymer, 189 U. S. 468.

[4] 3 VA. LAW REV. 537.

[5] Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; Norfolk Traction Co. *v.* Ellington, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117; Norfolk & Portsmouth Traction Co. *v.* Daily, 111 Va. 665, 69 S. E. 963; Southern R. Co. *v.* Foster, 111 Va. 763, 69 S. E. 972.

[6] 102 Va. 809, 47 S. E. 834.

[7] (Va.), 104 S. E. 393.

"We do not think, however, that any of these decisions intended to hold that the so-called 'unbending test' of negligence could be invoked, even in a case between master and servant, to exempt a defendant from liability where he had used an appliance or method known not to be reasonably adequate when one of the latter character was available. If they can be properly so construed, we are prepared to ingraft a qualification."

On behalf of the "Unbending Test" it must be said that it is an easy short cut to the determination of negligence and will adequately apply in most ordinary cases. But when special circumstances or unusual dangers appear in the case, then the above test fails, for who can say that the use of certain appliances which are inadequate, though generally used, is enough to rebut negligence as a matter of law, when others are adequate and available. It is not the common usage that makes a machine safe, nor does safety always make for common usage, especially if it involves a little more trouble and expense, and its absence cannot cause loss due to its being generally used in that trade. Under such a ruling it seems it would be poor business for an employer to install a new and safer appliance, different from the ordinary appliance in that trade, for then if an employee should receive an injury, the master would be liable for negligence as a matter of law, since his machine was not in general usage.

The recent case of *Jeffress* v. *Virginia R. & Power Co., supra,* has undoubtedly gone far in crystallizing the attitude of the Virginia courts towards what constitutes negligence, by making reasonable care entirely a question of fact for the jury and commensurate with the degree of risk involved.

F. B. F., Jr.

Substituted Service of Process by Posting on the Front Door—Due Process of Law.—Judge Burks, in his work on Pleading and Practice, p. 300,[1] raises the question whether service of process by posting on the front door of defendant's residence when no one is found there constitutes "due process of law", and will sustain a personal judgment by default. It is the purpose of this note to indicate what seems to be the state of the law upon the subject, both in respect to authority and principle.

According to the common law, service had always to be personal.[2] That such substituted service as is reasonably designed to bring actual notice to the defendant may be authorized by statute is everywhere conceded.[3] Even those States having no such statutes uphold foreign judgments based upon substituted

[1] Mr. Morrissett's late revision of Burks, Pleading and Practice, p. 293.

[2] Baldwin *v.* Baldwin, 116 Ga. 471, 42 S. E. 727.

[3] Note, 50 L. R. A. 585.